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No. 86-1414

IN THE

# SUPREME COURT

OF THE

UNITED STATES

## OCTOBER TERM, 1986

STATE OF OREGON,

*Petitioner,*

v.

MARY SETTLER, CARL SETTLER, and RANDY ALVIN SETTLER,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

## BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May state criminal defendants who violate both tribal and state law by selling fish caught out of season be acquitted, nevertheless, on the legal basis that they were exercising their tribe's treaty right?

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## INTEREST OF STATE OF WASHINGTON AS AMICUS CURIAE

The State of Washington today finds itself in direct government-to-government relationships with 22 Northwest Indian tribes which claim off-reservation fishing rights under a series of treaties entered into the mid-1850's. These treaties are known generally as the "Stevens Treaties," so called after Isaac Stevens, territorial governor and chief negotiator for the United States at that time. The nature and extent of the tribal fishing right reserved under the Stevens Treaties has been the subject of extensive litigation. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Washington Game Department*, 391 U.S. 392 (*Puyallup I*) (1967); *Puyallup Tribe v. Washington Game Department*, 414 U.S. 44 (*Puyallup II*) (1973); *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165 (*Puyallup III*) (1976); *Washington v. Wash-*

*ington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979).

In recent years, state officials in Washington have undertaken to seek negotiated settlement of a variety of complex state-tribal fishing disputes arising under the Stevens Treaties. The success of these efforts is dependent upon the tribes' ability to bind their members to tribal regulations. One obvious goal of the state in such arrangements is achievement of mutually satisfactory tribal self-limitation in areas where the full measure of the tribal fishing right is seriously disputed by state and tribal parties. Negotiated tribal self-limitation is an attractive alternative to further litigation. One major beneficial result is clearer definition of when a given individual is exercising his or her tribe's reserved fishing right, and is thus subject to tribal or state regulation.

The treatment of this case by the Oregon Court of Appeals and the Oregon Supreme Court adds serious confusion to the body of law developed under the Stevens Treaties. If not reviewed by this Court, this case will be a major disincentive to negotiate state-tribal fishing disputes in Washington (as well as in Oregon and Idaho, we presume). If individual members of treaty Indian tribes may, as here, violate tribal regulations governing off-reservation fish sales and still be permitted to assert a successful treaty right defense to state regulation or state criminal prosecution, a major state objective in tribal negotiations will simply be removed, with resulting increased likelihood of extensive federal court litigation of numerous state-tribal fishing disputes which remain.

## REASONS FOR GRANTING OREGON'S PETITION

The Oregon Court of Appeals has answered "Yes" to the Question Presented at the first page of this brief. By selling fish out of season, the Respondents clearly violated tribal law. Nevertheless, since the prosecution did not introduce evidence to overcome Respondents' personally-as-

serted treaty right defense, the appellate court held that motions for acquittal had been improperly denied. *See*, Petition for Writ of Certiorari, App-3. The Oregon prosecution should never have been required to overcome such a defense.

The lower court decisions in this case inherently reflect continuing confusion over the basic nature of the off-reservation tribal treaty fishing right. Is the right truly tribal and communal in nature, and thus derivatively exercisable by tribal members only under tribal auspices? Or is it exercisable by individual tribal members to the fullest potential extent, without regard to formal tribal action or inaction? The Oregon Court of Appeals took the latter view. In doing so, it failed to account for the contrary view taken by this Court in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 658 (*Puyallup III*) (1979).

More confusion on this point results from at least one recent decision of the Washington Court of Appeals, *State v. Courville*, 36 Wash.App. 615, 676 P.2d 1011 (1983). That case involved members of the Muckleshoot Tribe who were prosecuted for possession of shellfish in excess of state regulations. Invoking essentially the same treaty clause as did Respondents here, the *Courville* appellants satisfied the court that they were entitled to assert a treaty right defense since the shellfish were taken at their tribe's "usual and accustomed" fishing grounds, even though an order of the United States District Court for the Western District of Washington then prevented (and still prevents) the Muckleshoot Tribe and all other Washington treaty tribes from engaging in off-reservation shellfish gathering prior to a preliminary determination of their right to do so by that court. *See United States v. Washington*, 459 F.Supp. 1020, 1037 (W.D. Wash. 1978). Allowing the defense to be raised anyway, the state court held at 36 Wash.App. 615, 621-622:

> "* * * treaty fishermen may raise a treaty defense when charged with unlawful possession of shellfish *even though their tribe has not received a prelimi-*

> *nary determination of such right* in federal court * * *
>
> The language in [the federal court's order] appears to require the treaty tribes to adhere to a specific procedure prior to exercising their "power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites." [Cites omitted.] *This would not affect or restrict individual tribal members' substantive rights under their tribe's treaty rights.* That prior adjudication of a treaty right is not a prerequisite to the assertion of a treaty defense is further evident by the fact that the treaties are self-enforcing and became obligatory on the parties when ratified. [Cites omitted.]"

(Emphasis added.)

Like our petitioning sister state, Oregon, we think it is logically clear and necessarily implied that a tribal member who violates a tribal regulation governing off-reservation treaty fishing activities is not exercising any protected right of the tribe. Accordingly, we subscribe to the contents of the Petition for Writ of Certiorari at pp. 11-14. It does deserve emphasis, however, that this Court has already taken a decidedly different view from that of the Oregon and Washington appellate courts. In *Puyallup III*, *supra*, this Court acknowledged the tribal character of the treaty fishing right, stating:

> The [45%] limitation on the size of the net catch applies to all members of the Tribe. The [State of Washington] has no interest in how the catch is allocated among the Indians. Its concern is with the total number of steelhead netted during each season, with obtaining information to make it possible to recommend a proper allocation in succeeding years, and with enforcement against individuals who may net fish after the allowable limit has been reached * * *

433 U.S. at 178. The proper rule of law was even more succinctly expressed by Judge Rossman of the Oregon Court of Appeals in *State v. Jim (Warner)*, 81 Or.App. 177, ___ P.2d ___ (1986). There concurring in the affirmance of a state criminal conviction of another treaty tribal fisherman, Judge Rossman simply stated:

> Defendant caught fish [off-reservation] during a closed [state] season under a Warm Springs tribal permit which allowed him to catch fish only for ceremonial purposes and to sell them only to the tribes. He violated the terms of the permit by selling the fish commercially. He thereby violated [Oregon State law] unless some tribal right protects him from state prosecution. Because his actions were beyond the authority which the tribal permit granted, he has no tribal immunity. He is therefore subject to state law. That is where this case should end.

81 Or.App. at 184.

## CONCLUSION

For the reasons set forth, the State of Washington as amicus curiae urges this Court to grant the Petition for Writ of Certiorari.

DATED this 27th day of March, 1987.

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